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NO. 93-7927

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CURTIS LEE KYLES
Petitioner

Versus

JOHN P. WHITLEY, Warden
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF JOHN P. WHITLEY, RESPONDENT

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May It Please the Court:

Respondent John P. Whitley, Warden of the Louisiana State Penitentiary at Angola, Louisiana (hereinafter, "the State") opposes the grant of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, for the following reasons:

STATEMENT OF THE ISSUE

Whether the United States Court of Appeals for the Fifth Circuit committed clear error in determining that petitioner Curtis

Kyles received a fundamentally fair trial in the face of Kyles' allegations that the prosecution withheld exculpatory evidence, engaged in prosecutorial misconduct, and provided him with ineffective representation.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in Court Below:

Petitioner Curtis Lee Kyles was convicted in the Criminal District Court for the Parish of Orleans, Louisiana, of the First Degree Murder of Dolores Dye on September 20, 1984. The crime occurred during an armed robbery in the parking lot of a large grocery store in New Orleans, Louisiana. Trial was held in the Criminal District Court on December 6 and 7, 1984. The jury returned a verdict of guilty and recommended a death sentence.

Kyles appealed to the Louisiana Supreme Court, which affirmed the conviction and sentence, State v. Kyles, 513 So.2d 265 (La. 1987), cert. denied 486 U.S. 1027, 108 S.Ct. 20005, 100 L.Ed. 2d 236, reh. denied 487 U.S. 1246, 109 S.Ct. 4, 101 L.Ed. 2d 955 (1988).

Kyles applied for post-conviction relief in the Criminal District Court for the Parish of Orleans on January 2, 1989. That court then conducted an extensive evidentiary hearing on petitioner's application for post-conviction relief, and on

November 9, 1989 rendered a written opinion denying petitioner's application. The state trial judge stated his essential findings of fact in his written opinion. Kyles' application for review in the Louisiana Supreme Court was denied.

On October 28, 1990, Appellant Kyles filed a petition in the United States District Court for the Eastern District of Louisiana for relief under 28 U.S.C. 2254 (Writ of Habeas Corpus by a Person in State Custody). Without holding an evidentiary hearing, and based upon evidence presented in state post-conviction hearings, the United States District Court denied the petition. Kyles v. Whitley, 5 Fed. 3rd 844 (1992). Kyles appealed this decision to the United States Court of Appeals, which affirmed the denial of relief. Kyles v. Whitley, 5 Fed. 3rd 806 (5th Cir. 1993). Petitioner now seeks review of the decision of the Court of Appeals.

(ii) Statement of Facts

The facts established at the trial of this case are provided in detail in the opinion of the Louisiana Supreme Court affirming Kyles' conviction, **State v. Kyles**, 513 So.2d 265 (La. 1987), and in both the United States District Court decision and the decision of the United States Court of Appeals, supra.

Essentially, the state produced four eyewitnesses at Kyles' trial who testified that they saw Curtis Kyles put a gun to the

head of the victim, Dolores Dye, and shoot her. They saw this homicide occur in the bright afternoon light of a Schwegmann Brothers' Giant Supermarkets parking lot in New Orleans. They then saw Kyles get into Mrs. Dye's car and drive slowly from the parking lot. **State v. Kyles**, 513 So.2d at 267, 268.

In addition to the eyewitnesses' testimony, the state presented evidence at trial that (1) the gun used to kill Mrs. Dye was found behind a stove in the kitchen of the defendant's home within 72 hours of the homicide; (2) a sales slip found in Mrs. Dye's vehicle after the homicide bore the defendant's fingerprints; (3) Mrs. Dye's purse and personal belongings were found in a garbage can that had been placed for collection on the curb outside the defendant's home; and (4) a collection of pet foods similar to those habitually purchased by Mrs. Dye was found in the defendant's house after the homicide.

The defense at the trial was that one Joseph Wallace, called "Beanie," was the actual perpetrator, and that he had set up Curtis Kyles. This defense was fully explored during the trial, although the defense chose not to call "Beanie" Wallace as a witness at the trial. The state also did not call him, but on rebuttal the state had him brought back into the courtroom so that "Beanie" and the defendant, Curtis Kyles, could be compared by each of the jurors and also once again by each of the four eyewitnesses who had testified that they saw Kyles shoot Mrs. Dye. After viewing the two together, each eyewitness stated that, beyond a reasonable

doubt, Curtis Kyles was the perpetrator, and "Beanie" Wallace was not the perpetrator.

ARGUMENT

Reasons Why the Writ Should Not be Granted:

1. The legal questions presented by petitioner ultimately rest on factual findings made adversely to the petitioner.

Petitioner Kyles argues that his conviction and sentence of death "resulted from the failure of the State to provide to his trial counsel, upon request, and upon becoming aware of false testimony, significant, material, exculpatory evidence, and because his trial counsel failed to call as a witness Joseph Wallace a/k/a Beanie, the informant who led police to suspect Kyles, notwithstanding that he earnestly wanted to call Beanie as a witness." Petition, p. 11.

Each of the factual allegations made by petitioner has been considered by the state trial court in post-conviction proceedings, and by the United States District Court and the United States Court of Appeals for the Fifth Circuit in subsequent federal proceedings. All of these courts made findings of fact which either denied the truth of the allegations made by petitioner or determined that such facts, in the context of this case, did not deprive petitioner of a fundamentally fair trial. As the Fifth Circuit stated: "We are

not persuaded that either errors by counsel or prosecutorial misconduct hamstrung Kyles' defense. Rather, the jury rejected his defensive theory and viewed the overwhelming incriminating evidence as proof of Kyles' guilt." Kyles v. Whitley, 5 F.3rd at 820.

This Court does not traditionally sit to review alleged factual errors. See, e.g., United States v. Johnson, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S.Ct. 164 (1924) (dismissing the writ upon discovering that the dispute involved a question of fact rather than law); Houston Oil Co. v. Goodrich, 245 U.S. 440, 38 S.Ct. 140 (1918) (same).

This Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See: e.g., Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 318 n.5, 105 S.Ct. 725, 729 n. 5 (1985); United States v. Doe, 465 U.S. 605, 614, 104 S.Ct. 1237, 1243 (1984); United States v. Reliable Transfer Co., 421 U.S. 397, 401 n. 2, 95 S.Ct. 1708, 1711 n. 2 (1975).

2. This case is not now appropriate for review because issues pertinent to the case remain unexhausted in the state judicial system. As petitioner has pointed out in his statement of jurisdiction: "There is presently under consideration in the Louisiana State Court system an unexhausted claim concerning recantation by one of the alleged eyewitnesses to the murder of

which Kyles was convicted. Another evidentiary hearing will be scheduled within the next few weeks, as ordered by the Supreme Court of Louisiana." (Petition, p. 2) This claim by defendant has been described by the United States District Court. Kyles v. Whitley, 5 F.3rd 862 (1992).[1] Petitioner has not exhausted his remedies in the state judicial system. Until petitioner exhausts his remedies in the state system, review by the federal system is premature. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982).

This Court's usual practice is to await final judgment in the lower courts before exercising certiorari jurisdiction. See: e.g., Virginia Military Institute v. United States, 113 S.Ct. 2431 (1993) (opinion of Scalia, J.); Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R., 389 U.S. 327, 328, 88 S.Ct. 437, 438 (1967)(per curiam). It would be inappropriate for this Court to review defendant's conviction at this time because of the continuing litigation in state court.

[1]Petitioner sought relief from judgment pursuant to Fed.R.Civ.P. 60(b)(2) and (6), and the Fifth Circuit held that petitioner had no action under that rule. The Court of Appeals affirmed the judgment but vacated the District Court's opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 15th day of March, 1994 served a copy of the foregoing pleading on the attorney for petitioner herein by mailing a copy of same to:

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